86-28

No. ——

Supreme Court, U.S.
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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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IN RE INSPECTION OF NORFOLK DREDGING COMPANY

NORFOLK DREDGING COMPANY,
*Petitioner,*

v.

UNITED STATES SECRETARY OF LABOR,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

Whether the authority of the United States Coast Guard to regulate the working conditions of seamen aboard inspected and uninspected vessels operating on navigable waters gives rise to an industry-wide exemption from Occupational Safety and Health Administration (OSHA) jurisdiction under Section 4(b)(1) of the Occupational Safety and Health Act.

## PARTIES TO THE PROCEEDING BELOW

1. Norfolk Dredging Company, a Virginia corporation.*
2. United States Secretary of Labor.

* Petitioner, Norfolk Dredging Company, has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

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IN RE INSPECTION OF NORFOLK DREDGING COMPANY

NORFOLK DREDGING COMPANY,
*Petitioner,*

v.

UNITED STATES SECRETARY OF LABOR,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner, Norfolk Dredging Company, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit rendered in this case on March 10, 1986, petition for rehearing and suggestion for rehearing en banc denied on April 14, 1986.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, as yet unreported, appears in Appendix A. The opinion of the United States District Court for the Southern District of Florida, reported at 595 F.

Supp. 577, appears in Appendix B. Jurisdiction in the District Court was invoked under Section 8 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657.

## JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was rendered on March 10, 1986. A petition for rehearing and suggestion for rehearing en banc was denied by the Eleventh Circuit on April 14, 1986. This Petition for writ of certiorari was filed within ninety days from the date of denial of the rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Resolution of the question presented requires the interpretation of Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(1), which provides:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

## STATEMENT OF THE CASE

A seaman employed by Norfolk Dredging Company ("Norfolk") was fatally injured on April 30, 1984, while working on board the vessel JEKYLL ISLAND, which was located in navigable waters off the coast of Florida. The JEKYLL ISLAND is an uninspected commercial vessel, not owned by the United States Government, which was engaged in dredging operations at the time of the casualty. As required by 46 U.S.C. § 6101 and 46 C.F.R. § 4.05-1, the accident was reported by Norfolk to the United States Coast Guard which conducted a casualty investigation of the incident.

The following month, an employee of Norfolk reported the incident to the Occupational Safety and Health Administration (OSHA) which responded by attempting to inspect the vessel and conduct a second, duplicative fatality investigation. Norfolk refused to permit the intended inspection by OSHA on the grounds that the Coast Guard had already conducted the investigation and had exclusive jurisdiction over the maritime casualty. In response, OSHA filed an *ex parte* application with a federal Magistrate in the United States District Court for the Southern District of Florida, seeking an inspection warrant pursuant to 29 C.F.R. § 1903.4 (1985). Norfolk's motion to quash the warrant was denied by the Magistrate. On appeal to the district court, it was held that the United States Coast Guard's regulatory scheme encompassing safety and working conditions of seamen aboard both inspected and uninspected vessels was so pervasive that under Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(1) (1975), OSHA's jurisdiction was preempted. Accordingly, the district court ordered the warrant quashed.

The United States Secretary of Labor appealed the decision of the district judge to a panel of the United States Court of Appeals for the Eleventh Circuit, which reversed and remanded, concluding that the Coast Guard's regulation of safety aboard uninspected vessels was not comprehensive enough to preempt OSHA's jurisdiction to inspect the vessel and reinvestigate the marine casualty.

## REASON FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS ON THE SAME MATTER.

There is a widening split among the United States Courts of Appeals on the question whether a single, uniform set of rules governs the maritime workplace. Historically, the Coast Guard has exercised statutory au-

thority to regulate and supervise the working conditions of seamen serving on navigable waters. 14 U.S.C. § 2. Since the enactment of the Occupational Health and Safety Act of 1970 (the "OSH Act"), 29 U.S.C. §§ 651 *et seq.* (1970), however, various courts around the country have reached inconsistent results in answering the question whether the Occupational Safety and Health Administration (OSHA) has jurisdiction over some or all of the working conditions of seamen serving on navigable waters.

The Court of Appeals for the Fifth Circuit has held: "It is the law of this circuit that OSHA regulations do not apply to working conditions of seamen on vessels in navigation . . ." *Donovan v. Texaco, Inc.*, 720 F.2d 825, 826 (5th Cir. 1983); *see also Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1120, 1121 (5th Cir. 1980) (OSHA "does not apply to the working conditions of seamen on vessels operating on the high seas.")

Addressing the question whether there is possible overlapping jurisdiction of the Coast Guard and OSHA with respect to working conditions of seamen, the Court of Appeals for the Fourth Circuit has drawn a distinction between shore-based workers and seamen, stating:

> When longshoremen were involved the courts have looked exclusively to the regulations issued by the Secretary of Labor under OSHA and never to the Coast Guard; in cases where seamen were involved, the courts have looked exclusively to Coast Guard regulations. And this was not because, as the plaintiff would urge, the courts have overlooked the regulations of the other agency in making its decision but because in each instance it recognized the exclusivity of the regulations of the particular agency having responsibilities, whether for seamen or longshoremen.

*Taylor v. Moore-McCormack Lines, Inc.*, 621 F.2d 88, 93 (4th Cir. 1980). In *Barger v. Mayor and City Council*

*of Baltimore*, 616 F.2d 730, 732 (4th Cir. 1980), *cert. denied*, 449 U.S. 834 (1981), the Fourth Circuit stated the rule in that jurisdiction as follows:

> The Coast Guard is empowered to lay down health and safety rules for Jones Act seamen and the courts have recognized that the OSHA regulations thus do not apply to this category of employees.

The Court of Appeals for the Ninth Circuit has recently stated in a seaman's personal injury case that "[t]he Coast Guard is the primary federal agency which exercises authority over the working conditions of seamen" in support of its conclusion that an OSHA regulation was inapplicable. *Kopczynski v. THE JACQUELINE*, 742 F.2d 555, 559 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2677 (1985).

The Court of Appeals for the Second Circuit, however, has held that the exclusive jurisdiction of the Coast Guard over the working conditions of seamen is dependent upon whether the vessel on which the seamen are serving is inspected or uninspected. *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1355 (1985).

In reaching the decision below, a panel of the Eleventh Circuit, disregarding its own binding precedent, has adopted the rationale of the Second Circuit in holding that the Coast Guard's regulation of safety aboard uninspected vessels is not sufficiently pervasive so as to preempt OSHA of jurisdiction to reinvestigate an accident which occurred in navigable waters aboard an uninspected vessel.

It is not just the courts which have reached inconsistent results. The Occupational Safety and Health Review Commission itself concluded in 1982 that Section 4(b)(1) of the OSH Act, creates—in view of the Coast Guard's comprehensive regulation and supervision of seamen's working conditions—an industry-wide exemption for sea-

men serving on vessels operating on navigable waters. *Secretary of Labor v. Dillingham Tug and Barge Corp.*, 10 B.N.A. OSHC 1859 (1982).

The current state of the law is confusing and confused. Some jurisdictions recognize an industry-wide exemption from OSHA jurisdiction for seamen serving on vessels on navigable waters regardless of vessel type. Other courts have ruled that Coast Guard jurisdiction is exclusive only if the vessel is inspected. Others have adopted a "nook and cranny" approach holding that whatever detail the Coast Guard's regulatory plan has left untouched may be regulated by OSHA. Because the question whether the Coast Guard or OSHA is the appropriate federal agency to regulate and supervise the working conditions of seamen aboard vessels on navigable waters is of national significance, it should be settled by this Court. The issue is of special importance because five of the United States Courts of Appeals have now addressed the question with differing answers. As a consequence, there is no uniformity among the circuits as to how this important question of maritime law should be resolved.

Section 4(b)(1) of the OSH Act evidences a general Congressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. As the Fifth Circuit stated in *Donovan v. Texaco, Inc.*, "[s]uch redundant control programs offer little except confusion, governmental proliferation, and stultification of enterprise." 720 F.2d at 827.

OSHA has broad responsibility for regulating health and safety "with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.), Johnston Island, and the Canal Zone." 29 U.S.C. § 653(a). In adopting the OSH Act, however,

Congress was well aware that a variety of federal agencies already had exercised jurisdiction to promulgate health and safety regulations in specific industries and, therefore, Section 4(b)(1) was enacted to avoid needless duplication of effort and resources.

As the courts have repeatedly recognized, the very purpose of Section 4(b)(1) was "to eliminate any duplication in the efforts of federal agencies to secure the well-being of employees." *Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2d Cir. 1978); *Organized Migrants in Community Action, Inc. v. Brennan*, 520 F.2d 1161, 1166-68 (D.C. Cir. 1975); *Southern Pacific Transportation Co. v. Usery*, 539 F.2d 386, 392 (5th Cir. 1976), *cert. denied*, 434 U.S. 874, (1977). The proscription against duplicating regulations has been specifically applied to regulations issued by the Department of Labor under OSHA and of the Coast Guard governing safety regulations covering longshoremen and seamen. *Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1120, 1122 (5th Cir. 1980); *see also Mott v. Odeco*, 577 F.2d 273, 278, n.6 (5th Cir. 1978), *cert. denied*, 400 U.S. 912 (1979); *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F. Supp. 913, 919, 920 (E.D.La. 1977), aff'd, 608 F.2d 522 (5th Cir. 1979).

OSHA's regulatory scheme has traditionally been limited to land-based workplaces, whereas the Coast Guard's jurisdiction is seaward-oriented. The Coast Gaurd has consistently been viewed as the "dominant agency in maritime safety" responsible for promulgating regulations protective of the health and safety of seamen.

The current confused state of the law, however, makes the standards by which the working conditions of seamen are judged dependent upon the proximity of a seaman's vessel to a particular federal Court of Appeals. In enacting the OSH Act, Congress did not envision overlapping jurisdiction of OSHA and the Coast Guard with respect to the transient workplace of a seaman. Without a pro-

nouncement by this Court as to whether there is an industry-wide exemption from OSHA jurisdiction for seamen aboard vessels on navigable waters, the standards for health and safety of a seaman will continue to depend on the type and/or the geographical location of a vessel. The confused and conflicting decisions have caused seamen to "steam in and out" of OSHA or Coast Guard jurisdiction, a result never intended by Congress.

## CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the opinion of the Court of Appeals for the Eleventh Circuit. It is respectfully urged that the time has come for this Court to bring uniformity to the interpretation and application of a principle of law affecting the entire maritime industry.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 84-5896

IN RE INSPECTION OF NORFOLK
DREDGING COMPANY

APPEAL OF UNITED STATES
SECRETARY OF LABOR,
*Appellant.*

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March 10, 1986

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Appeal from the United States District Court
for the Southern District of Florida

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Before VANCE and HATCHETT, Circuit Judges, and ATKINS *, Senior District Judge.

HATCHETT, Circuit Judge:

The district court quashed an Occupational Safety and Health Administration (OSHA) inspection warrant on the ground that OSHA lacks jurisdiction over working conditions aboard uninspected vessels in navigable waters. We reverse.

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

## FACTS AND PROCEDURAL HISTORY

Appellee, Norfolk Dredging Company (Norfolk) operates a dredge known as "Jekyll Island" in navigable waters off the west coast of Florida. On April 30, 1984, one Norfolk employee was killed and another employee injured due to the operation of a crane aboard the "Lima" barge.[1] Acting pursuant to 46 U.S.C.A. § 6301 (West Supp.1983), which authorizes the Coast Guard to investigate marine casualties, the Coast Guard initiated an investigation of the incident.

On May 10, 1984, in response to a Norfolk employee's complaint of inadequate maintenance of crane equipment and cables aboard the "Lima," an OSHA compliance officer attempted to conduct a fatality investigation and safety inspection of the "Jekyll Island." Norfolk refused him entry onto the dredge. Acting pursuant to 29 C.F.R. § 1903.4 (1985), OSHA obtained an ex parte administrative warrant to inspect the dredge.

Norfolk learned of the issuance of the warrant before its execution and moved to quash it. The magistrate who had issued the warrant denied Norfolk's motion. On appeal, the district court found that the Coast Guard's regulatory scheme encompassing safety and working conditions aboard vessels was so pervasive that, under section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 653(b)(1) (West 1975), it preempted OSHA's jurisdiction over safety aboard uninspected vessels. Accordingly, the district court ordered the warrant quashed. *In Re Inspection of Norfolk Dredging Company*, 595 F.Supp. 517 (S.D.Fla.1984).

## CONTENTIONS OF THE PARTIES

OSHA contends that the district court abused its discretion by addressing the merits of Norfolk's claim with-

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[1] The "Lima" is one of two "Jekyll Island" barges. The second barge is known as the "Unit."

out requiring Norfolk to exhaust its administrative remedies. Norfolk counters that the policy considerations underlying the exhaustion doctrine would not be served by requiring exhaustion in this case, and that several exceptions to the exhaustion doctrine are applicable.

Assuming that the issue of OSHA's jurisdiction was properly before the district court, OSHA further contends that the district court incorrectly construed section 4(b)(1). OSHA argues that its jurisdiction under section 4(b)(1) is preempted only where another agency actually exercises its authority. The Coast Guard's comprehensive regulatory scheme applies primarily to inspected vessels; therefore, the Coast Guard's regulatory scheme does not constitute an exercise of authority over uninspected vessels sufficient to divest OSHA of jurisdiction.

Norfolk contends that the Coast Guard's comprehensive regulatory scheme constitutes an exercise of its jurisdiction over uninspected vessels sufficient to preempt OSHA's regulatory authority, and that OSHA itself has recognized that the Coast Guard has jurisdiction over vessel crews.

## ISSUES

We are asked to resolve a jurisdictional conflict between the inspection authority of OSHA and the Coast Guard. It is important to note, however, that the Coast Guard is not before the court. Our first issue is whether a party challenging OSHA's jurisdiction must exhaust administrative remedies before seeking redress in federal court. Next, we consider whether the Coast Guard's regulation of working conditions aboard vessels is so pervasive that it preempts OSHA's jurisdiction over uninspected vessels.

## DISCUSSION

In the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651(b) (West 1985), "Congress declare[d] it to be its purpose and policy . . . to assure so far as pos-

sible every working man and woman in the Nation safety and healthful working conditions and to preserve our human resources. . . ." The Secretary of the Department of Labor, acting through OSHA, is charged with the responsibility of implementing this purpose.

OSHA's enforcement powers include the authority to enter, inspect, and investigate places of employment. 29 U.S.C.A. § 657(a) (West 1985). OSHA's enforcement authority is not, however, absolute. Section 4(b)(1) of the Act provides:

> Nothing in [the Act] shall apply to working conditions of employees with regard to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

29 U.S.C.A. § 653(b)(1). The second issue in this case turns upon the interpretation and application of section 4(b)(1).

I. Exhaustion of Administrative Remedies

OSHA contends that the interpretation and application of section 4(b)(1) is not properly before us because Norfolk failed to exhaust its administrative remedies before presenting the issue to the district court. OSHA urges a ruling that Norfolk must submit to the inspection, then if violations are found and citations issued, Norfolk may contest OSHA's jurisdiction in proceedings before the Occupational Safety and Health Review Commission (OSHRC). *See* 29 U.S.C.A. § 659 (West 1985); *Cerro Metal Products v. Marshall*, 620 F.2d 964, 970 (3rd Cir. 1980). Other circuits have adopted this analysis. *See, e.g., Marshall v. Burlington Northern, Inc.*, 595 F.2d 511 (9th Cir.1979); *Matter of Restland Memorial Park*, 540 F.2d 626 (3rd Cir.1976).

The exhaustion doctrine requires parties to pursue all administrative remedies before seeking judicial relief.

*Parisi v. Davidson*, 405 U.S. 34, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972); *Panola Land Buyers Association v. Shuman*, 762 F.2d 1550, 1556 (11th Cir.1985); *Jean v. Nelson*, 711 F.2d 1455, 1505-06 (11th Cir.1983). Exhaustion is not a jurisdictional requirement. Rather, it is a matter of discretion with the district court. *Panola Land Buyers Association*, 762 F.2d at 1556-57; *Jean*, 711 F.2d at 1505-06.

Our determination of whether the district court abused its discretion is twofold. We consider (1) whether requiring exhaustion in this case would further the policies underlying the doctrine, and (2) whether any exceptions to the doctrine are applicable. *Deltona Corporation v. Alexander*, 682 F.2d 888, 893-94 (11th Cir.1982); *Baldwin Metals Company, Inc. v. Donovan*, 642 F.2d 768, 771 (5th Cir.1981).[2]

The policies underlying the exhaustion doctrine are many. They include:

> protecting administrative autonomy, deferring to agency expertise, facilitating judicial review through creation of a factual record by the agency, and conserving the time and energy of the courts since the judicial controversy may be mooted if the agency grants the relief sought.

*Baldwin*, 642 F.2d at 771-72; *see also Jean*, 711 F.2d at 1505-06 (quoting *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1034 (5th Cir. Unit B. 1982) (citations omitted)); *Deltona Corporation* 682 F.2d at 893.[3]

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[2] Fifth Circuit opinions rendered prior to October 1, 1981, are binding precedent in the Eleventh Circuit until overruled by this court sitting en banc. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

[3] Fifth Circuit Unit B decisions rendered after September 30, 1981, are binding precedent in the Eleventh Circuit until overruled by this court sitting en banc. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982).

The facts and circumstances of this case counsel against exhaustion.

> If resort to the prescribed administrative procedures would be futile or inadequate to prevent irreparable injury, or if blatant violations of constitutional or statutory rights have already occurred, the exhaustion of administrative remedies should not be required.

*Baldwin*, 642 F.2d at 773 (citations omitted).

In this case, OSHA did not blatantly violate Norfolk's rights. On the other hand, we cannot say Norfolk's pursuit of its administrative remedies would have been futile. It is clear, however, that Norfolk would suffer irreparable injury if it were required to exhaust its administrative remedies.

In *Baldwin*, we held that

> if a federal court is asked to consider the validity of a warrant prior to its execution . . . exhaustion of remedies will not be appropriate, since the irreparable harm of the threatened unconstitutional search can be prevented prior to the warrant's execution.

642 F.2d at 774 n.13 (citations omitted).

Relief is available to an employer where OSHA issues citations based upon violations found during an allegedly unconstitutional inspection. Under this circumstance, the employer could seek judicial review of the administrative decision to use evidence of violations found during the inspection. The employer has no relief from an unconstitutional search, however, if no safety violations are found. The injury is real with or without a violation. Thus, the injury is irreparable.

OSHA has not executed the inspection warrant issued in this case. The irreparable injury exception to the exhaustion doctrine is, therefore, applicable to prevent the allegedly unconstitutional search.

*Marshall v. Burlington Northern, Inc.*, 595 F.2d 511 (9th Cir.1979), which OSHA relies upon, is not to the contrary. The allegedly unconstitutional search in *Burlington* had already occurred at the time the employer raised the section 4(b)(1) jurisdictional issue before the district court. OSHA had conducted a safety inspection and found safety violations. "[A]ny injury due to an erroneous admission by OSHRC of the allegedly unconstitutionally seized evidence [could] be 'repaired' by judicial review of the OSHRC decision, and therefore [was] not 'irreparable.'" *Baldwin* 642 F.2d at 774. The Supreme Court held in *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), that the fourth amendment prohibits warrantless safety inspections under 28 U.S.C.A. § 657(a). The inspection in *Burlington* occurred three years prior, in 1975. Thus, the compliance officer in *Burlington* did not act pursuant to an inspection warrant.

The Third Circuit held in *Matter of Restland Memorial Park*, 540 F.2d 626 (3d Cir.1976), that exhaustion was required even though OSHA's jurisdiction was challenged before an inspection had occurred. The third Circuit retreated from this position, however, in *Cerro Metal Products v. Marshall*, 620 F.2d 964, 970-72 (3d Cir. 1980).

The consolidated appeals in *Cerro* were from preliminary injunctions which the district court had ordered prohibiting OSHA from applying for ex parte inspection warrants. The *Cerro* court examined the policies underlying the exhaustion doctrine and "conclude[d] that no legitimate purpose would be served by requiring exhaustion of administrative remedies in the context of [that] dispute." *Cerro*, 620 F.2d at 971. The court held in the alternative that, were the case deemed to be one normally subject to the exhaustion requirement, the irreparable injury exception would apply. *Cerro*, 620 F.2d at 971-72 n.17. Consequently, the district court did not abuse its

discretion by not requiring Norfolk to exhaust its administrative remedies.

## II. Preemption Under Section 4(b)(1)

Having concluded that the district court properly exercised jurisdiction over Norfolk's claim, we next address whether the Coast Guard's exercise of authority over maritime safety is sufficient to preempt OSHA of jurisdiction over working conditions aboard uninspected vessels.

OSHA is charged with the responsibility of regulating the health and safety of our nation's workforce. *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 777 (2d Cir.1984). Cognizant that the authority of federal agencies having jurisdiction over specific industries also includes the authority to promulgate employee health and safety standards, Congress enacted section 4(b)(1) to avoid duplication of effort and resources. *Southern Pacific Transportation Co. v. Usery*, 539 F.2d 386, 392 (5th Cir.1976).

The mere existence of an agency's authority to regulate health and safety *is not sufficient* to preempt OSHA of jurisdiction under section 4(b)(1); "some 'exercise' of that authority is necessary." *Southern Pacific*, 539 F.2d at 389. The dominant agency must either promulgate regulations governing the working condition at issue, or articulate a policy that the condition not be regulated. *Southern Pacific*, 539 F.2d at 391-92.

This issue turns on the difference between "inspected" and "uninspected" vessels. "Uninspected vessels" are defined in 46 U.S.C.A. § 2101(43) (West Supp.1985) as nonrecreational vessels not subject to the Coast Guard's safety inspection and certification authority. Uninspected vessels are vessels such as tugboats, towing vessels, and barges. It is undisputed that "Jekyll Island" is an uninspected vessel in navigable waters and that the Coast

Guard exercises limited authority over uninspected vessels.

The Coast Guard's regulation of safety aboard uninspected vessels does not encompass crane safety, the working condition at issue here. *Cf.* 29 C.F.R. § 1926.550 (1985) (OSHA crane equipment regulation). The Coast Guard also has not articulated a policy against regulation of crane equipment.

> In fact, the Coast Guard has historically viewed its authority to regulate uninspected vessels as limited to the regulation of life-saving and fire fighting equipment, back fire flame control, ventilation, the reporting of casualties and the licensing of operators.

*Red Star*, 739 F.2d at 777; *see also* 46 U.S.C.A. §§ 4101-4106 (West Supp.1985); 46 C.F.R. §§ 24.01-1-26.30-10 (1984).[4]

Were we to adopt Norfolk's position, no federal agency would have the authority to regulate the safety of crane equipment aboard uninspected vessels. *Red Star*, 739 F.2d at 788. The result which Norfolk urges us to reach is clearly contrary to the legislative intent of section 4(b)(1). "Congress obviously wanted . . . health and safety conditions [aboard uninspected vessels] to be regulated . . . by *some* agency since it took the unusual step of requiring an actual exercise of authority to forestall OSHA coverage." *Southern Pacific*, 539 F.2d at 39 (emphasis in original).

Norfolk relies heavily upon *Donovan v. Texaco, Inc.*, 720 F.2d 825, 826 (5th Cir.1983), in which the Fifth Circuit held that the Coast Guard regulation and super-

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[4] The Coast Guard has sought congressional approval to expand its authority to regulate uninspected vessels, but without success. We agree with the Second Circuit that Congress's failure to act "clearly evidences an unwillingness to expand the Coast Guard's authority over the uninspected fleet." *Red Star*, 739 F.2d at 777.

vision of seamen's working conditions is so comprehensive that it creates "an industry-wide exemption for seamen serving on vessels operating on navigable waters." (Citation omitted). We find *Texaco* distinguishable.[5]

OSHA argued in *Texaco* that its jurisdiction was not preempted because the Coast Guard's regulation of the rights and duties of seamen did not include a specific prohibition against retaliatory discharge of employees. The *Texaco* court rejected this argument on the ground that the Coast Guard's regulatory scheme provided protection parallel to that which the OSHA regulatory scheme provided. The statutes which the court relied upon govern the rights and duties of seamen with regard to such matters as compensation and discharge. They do not relate to working conditions aboard vessels. *See, e.g., Texaco,* 720 F.2d at 828-29.[6] Thus, the court had no occasion to recognize that the Coast Guard's comprehensive regulatory scheme relates primarily to seamen aboard inspected vessels.

The *Texaco* court considered its industry-wide exemption to be consistent with the requirement in *Southern Pacific* that a dominant agency actually exercise its jurisdiction. We do not agree that *Southern Pacific* "envisions that regulation of an industry by the dominant agency may be so general and pervasive as to displace OSHA coverage of it entirely." *Texaco,* 720 F.2d at 826 n.1.

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[5] *Texaco* cites *Clary v. Ocean Drilling and Exploration Co.,* 609 F.2d 1120 (5th Cir. 1980), for the proposition that "OSHA regulations do not apply to working conditions of seamen on vessels in navigation. . . ." 720 F.2d at 826. The regulations at issue in *Clary* did not, however, apply to the special purpose vessel in that case. They applied only to construction work, ship repairing, shipbuilding, shipbreaking, and longshoring. *Clary,* 609 F.2d at 1122. OSHA exercised no jurisdiction which could be preempted. Thus, *Texaco*'s reliance upon *Cleary* is misplaced.

[6] Many of the statutes relied upon in *Texaco* have been repealed and reenacted.

As we stated in *Southern Pacific*, the effect of section 4(b)(1) turns upon the precise working condition at issue:

> [C]omprehensive [dominant agency] treatment of the general problem of . . . fire protection [for example] will displace all OSHA regulations on fire protection, even if the [dominant agency] activity does not encompass every detail of the OSHA fire protection standards, but [dominant agency] regulation of portable fire extinguishers will not displace OSHA standards on fire alarm signaling systems.

539 F.2d at 391.

We conclude that the Coast Guard's regulation of safety aboard uninspected vessels is so circumscribed that it does not preempt OSHA's jurisdiction over crane safety aboard uninspected vessels, such as "Jekyll Island." We reverse the judgment of the district court quashing the inspection warrant and remand the action for further consideration.[7]

REVERSED AND REMANDED.

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[7] Norfolk moved this court to strike Attachments "A" and "B" of OSHA's brief. We GRANT the motion on the ground that the documents were not presented to the district court. *Cf. Allen v. State of Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984) (appellate court generally does not consider issues not raised before the district court).

## APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

---

Case No.: 84-4197-CIV-KYLE

---

IN RE INSPECTION OF NORFOLK DREDGING CO.
and the DREDGE "JECKELL"

---

[Filed Sept. 10, 1984]

---

ORDER

THIS CAUSE has come before the court upon appeal of the Honorable Patricia Kyle's decision denying the motion of the Norfolk Dredging Company ("Norfolk") and the dredge "Jeckell" to quash the administrative search warrant issued to the Occupational Safety and Health Administration ("OSHA"). The sole issue before the court is whether section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C.A. § 653(b)(1) (1975), precludes an OSHA inspection because the United States Coast Guard has jurisdiction over safety aboard "uninspected" vessels.

The facts giving rise to this case are relatively simple. On April 30, 1984, an employee of Norfolk was fatally injured when the boom of the crane he was operating fell and struck him. The employee and the crane were on the same "uninspected" dredge in navigable waters within the State of Florida. Shortly after the accident,

another emplyoyee of Norfolk filed a complaint with OSHA charging the company with providing unsafe working conditions aboard the dredge. When officers of OSHA attempted to inspect the dredge, representatives of Norfolk denied them entry. OSHA applied to Magistrate Kyle for an administrative inspection warrant authorizing an examination of the barge. The Magistrate signed the warrant and Norfolk moved to quash it. The Magistrate denied that motion prompting this appeal.

OSHA seeks affirmance of the Magistrate's decision principally on the basis of the Second Circuit's ruling in *Donovan v. Red Star Marine Services, Inc.*, Nos. 83-4158, 4168 (2d Cir. July 10, 1984). In *Red Star*, OSHA suspected that the tugboat failed to provide protection against excessive noise levels. When inspectors attempted to board the vessel, representatives of the Red Star denied them entry and contested OSHA's authority to conduct the investigation. The OSH Commission held, *inter alia*, that OSHA did not have jurisdiction over the working conditions of "seamen" aboard uninspected vessels. The Second Circuit reversed in part and remanded the case, ruling that section 4(b)(1) of OSH Act did not preclude OSHA from exercising jurisdiction over "uninspected" vessels.

Upon examination of the *Red Star* decision, it is clear that the court ruled as it did because the tugboat was an "uninspected" vessel. One passage in the decision is illustrative of the point.

> [I]t cannot be questioned that there is a significant distinction between "uninspected" vessels and "inspected and certificated" vessels, in that the regulations affecting "inspected and certificated" vessels are more numerous, extensive, and pervasive than those affecting "uninspected" vessels.
>
> . . . .

> Although not in issue, the Secretary concedes that the pervasive regulations by the Coast Guard of safety and health aboard *inspected* vessels eliminates or excludes OSHA's jurisdiction over those vessels.[2]
>
> [2] In accordance with a "Memorandum of Understanding" signed by the Commandant of the Coast Guard and the Assistant Secretary for [OSHA], the Secretary has taken the position that "the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard *inspected* vessels," and that OSHA may not enforce its regulations with respect to "seamen" aboard *inspected* vessels.

*Red Star*, slip op. at 5117.

There were other reasons for the Second Circuit's decision. The court found that Congress historically has limited the Coast Guard's authority to regulate uninspected vessels to life-saving and fire-fighting matters. The court also was of the opinion that section 4(b)(1) limits OSHA's jurisdiction only when a sister federal agency *actually* is exercising authority in the same area, and the Coast Guard does not exercise this type of authority over uninspected vessels. For all of these reasons, the court of appeals instructed the OSH Commission to permit OSHA agents to inspect the tugboat.

This court respectfully reaches a different result largely because the Eleventh Circuit and the former Fifth Circuit have decided otherwise while expressly rejecting the arguments cited by the Second Circuit in support of its decision.

The starting point for our analysis in *Donovan v. Texaco, Inc.*, 720 F.2d 825 (11th Cir. 1983). The *Donovan* court had to decide whether OSHA's prohibition against the retaliatory discharge of an employee applies to a Texaco employee who had complained to the Coast Guard about certain generating equipment aboard a vessel in navigable waters and, as a result, was demoted.

The district court ruled that OSHA lacked jurisdiction to sue Texaco on the employee's behalf, and the appellate court affirmed.

In view of the *Red Star* court's reliance on the "uninspected" status of the vessel in reaching its decision, it would appear that the most significant aspect of *Donovan* is that court's refusal to draw a legal distinction between "inspected" and "uninspected" vessels for purposes of defining the scope of OSHA's jurisdiction. After quoting from the OSHA-Coast Guard memorandum agreement (cited at 48 Fed. Reg. No. 53, Mar. 17, 1983, and referred to in part herein, *supra* p. 2-3), the *Donovan* court clearly and unequivocally refused to give it any legal significance. The court's comments are worth repeating.

> We commend the effort . . . of the agencies to arrive at an ad interim mode of composing their conflicting assertions of authority. Since, for our Circuit, these are today resolved . . . we attach little significance to the agencies' earlier estimations of the relative strength of their positions to be debated before us. It is not for modalities of the federal power to trade functions between themselves in perpetuity by agreement; the will of Congress must control. The basis of their compromise vanishes also. For our Circuit, on this point, the agreement is no more.

720 F.2d at 827-28 n.3.

A careful reading of *Donovan* makes clear that the Eleventh Circuit is more concerned with the general industry-wide exemption for seamen serving on vessels operating on navigable waters created by section 4(b)(1) than it is with the legal status of the vessel itself. Section 4(b)(1) states that OSHA regulations do not apply to the "working conditions of employees" whose well-being is monitored by other federal agencies. The *Donovan* court found that the Coast Guard's "comprehensive reg-

lation and supervision of seamen's conditions" aboard vessels operating in navigable waters were sufficiently "general and pervasive as to displace OSHA coverage of it entirely . . . ." *Id.* at 826 & n.1 (relying on *Southern Pacific Transportation Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976), and *Secretary of Labor v. Dillingham Tug and Barge Corp.*, 10 B.N.A. OSHC 1859 (1982)). This finding is particularly important because the Coast Guard regulations in *Donovan* lacked a specific prohibition against retaliatory discharges, and the Eleventh Circuit easily could have limited the Coast Guard's jurisdiction because of the disparity in the specificity of its regulations vís-a-vis those of OSHA on the subject. But it did not chiefly because the court considered the right to complain about job hazards without fear of retaliation to be a condition of work which the Coast Guard regulates generally, though it may not have promulgated a specific prohibition against such employer actions. The Fifth Circuit's decision in *Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980), holding that OSHA regulations do not apply to the working conditions of seamen on vessels in navigation, is consistent with the result in *Donovan.*

The *Donovan* court also circumscribed OSHA's jurisdiction because the Coast Guard was seen as the agency most capable of appreciating and thus capable of regulating the "unique" working and living conditions of seamen. The court examined a host of Coast Guard regulations and found that many "afford[ed] protections paralleling, in some degree, that accorded complaining landside workers by the [retaliatory discharge] provisions of Section 11(c) of OSHA." 720 F.2d at 828. The court reasoned that

> to impose on this ancient and delicately balanced scheme, long predating OSHA and crafted to conform to the special conditions of seamen's complaints about shipboard working conditions, the parallel but

> divergent protective plan of 11(c) would be precisely the sort of duplication that the Congress meant to forbid by enacting Section 4(b)(1) of OSHA.

Additionally, the Eleventh Circuit found that OSHA's regulations do not apply to vessels on navigable waters except those on Outer Continental Shelf Lands. 720 F.2d at 829.

The *Donovan* decision stands as a beacon directing this court to the proper result. Rather than focus on the "uninspected" status of the vessel, as did the Second Circuit in *Red Star*, *Donovan* counsels us to examine the Coast Guard's regulations to determine if they are sufficiently extensive to cover the situation presented by the death of a Norfolk employee. The Coast Guard's regulations need not cover the field with particularity, for if the general regulations governing employee discharge addressed in *Donovan* were legally adequate, then similarly generalized rules will do here, too. This is especially true where, as here, the matter is one that traditionally falls within the Coast Guard's jurisdiction.

A review of the statutes governing Coast Guard activities reveals several provisions that provide for Coast Guard jurisdiction over safety and working conditions aboard vessels. Section 653 of Title 46 of the United States Code entitles a crew member to complain about the seaworthiness of his vessel; section 658 addresses the discharge of the crew if the vessel is unseaworthy; and sections 660a and 660b discuss the Coast Guard's authority to inspect the crew quarters of rigged and unrigged vessels, respectively.

The federal regulations also are dotted with sections detailing the Coast Guard's jurisdiction over boating safety. For example, the Coast Guard oversees equipment safety on vessels, 33 C.F.R. §§ 175.1-.140, 183.1-.715 (1983); it has the authority to investigate accidents aboard ship, 46 C.F.R. §§ 4.01-.40 (1983); and there ex-

ists a fairly detailed set of regulations setting forth the Coast Guard's responsibilities for the safety of working conditions aboard uninspected vessels, 46 C.F.R. §§ 24, 25, & 26 (1983).

Based on the existing statutory and regulatory provisions governing Coast Guard activity, the court finds that the Coast Guard does have jurisdiction over the accident aboard the Norfolk, and thus OSHA cannot commence an investigation that is duplicative and effectively ousts the Coast Guard of its authority over the incident. This conclusion finds further support in the secondary and tertiary rationales of the *Donovan* court (explained above), whose reasoning and conclusion distinguishes this case from the *Red Star* decision.

Accordingly, the decision of the Magistrate denying Norfolk's motion to quash OSHA's administrative inspection warrant is REVERSED, and this case is REMANDED to the Magistrate's Court for a result consistent with this opinion.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 10th day of September, 1984.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
United States District Judge

cc: counsel of record

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 84-5896

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D.C. Docket No. 84-4197

IN RE INSPECTION OF NORFOLK DREDGING COMPANY,
UNITED STATES SECRETARY OF LABOR,
*Appellant.*

---

Appeal from the United States District Court for the
Southern District of Florida

---

Before VANCE and HATCHETT, Circuit Judges, and ATKINS *, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that appellee pay to appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 10, 1986

For the Court: Spencer D. Mercer, Clerk

By: /s/ [Illegible]
Deputy Clerk

Issued as Mandate: Apr. 22, 1986

Supreme Court, U.S.
FILED
SEP 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-28 (2)

# In the Supreme Court of the United States

OCTOBER TERM, 1986

NORFOLK DREDGING COMPANY, PETITIONER

*v.*

SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the Occupational Safety and Health Administration retains authority to enforce standards relating to crane safety, promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. II) 651 *et seq.*, aboard an uninspected vessel in navigable waters, where no other federal agency has exercised authority to regulate the particular hazard or to regulate generally the working conditions of seamen aboard uninspected vessels.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-28

NORFOLK DREDGING COMPANY, PETITIONER

*v.*

SECRETARY OF LABOR

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 783 F.2d 1526. The order of the district court (Pet. App. 12a-18a) is reported at 595 F. Supp. 517.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on March 10, 1986, a petition for rehearing was denied on April 14, 1986 (790 F.2d 88 (Table)), and the petition for a writ of certiorari was filed on July 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner operates a dredge known as the *Jekyll Island* in navigable waters off the west coast of Florida (Pet. App. 2a, 12a). As petitioner concedes (Pet. 2), the *Jekyll*

*Island* is an uninspected vessel under Coast Guard standards (Pet. App. 8a-9a, 12a).[1] On April 30, 1984, one of petitioner's employees was killed and another injured when the boom of a crane located aboard one of the *Jekyll Island's* two uninspected barges suddenly fell (*id.* at 2a, 12a). In response to an employee complaint alleging that crane equipment aboard that barge was inadequately maintained, an Occupational Safety and Health Administration (OSHA) compliance officer attempted to inspect the *Jekyll Island* (*id.* at 2a, 13a).[2] Petitioner refused to permit the compliance officer to conduct the inspection (*ibid.*).

2. Respondent obtained an ex parte administrative warrant from a United States magistrate to inspect the *Jekyll Island* and its barges (Pet. App. 2a, 13a). See 29 C.F.R. 1903.4. Petitioner unsuccessfully moved the magistrate to quash the warrant before its execution (Pet. App. 2a, 13a). On appeal, the district court agreed to quash the warrant, citing Section 4(b)(1) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 653(b)(1), which precludes OSHA from asserting its authority over "working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

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[1]Certain vessels are subject to Coast Guard inspection. 46 U.S.C. (Supp. II) 3301. Those not subject to inspection, including most tugboats and towing vessels, all fishing vessels, many seagoing barges, and freight vessels under 15 tons, are deemed to be "uninspected vessels." 46 U.S.C. (Supp. II) 2101(43), 3301, 3302.

[2]Pursuant to its statutory authority to investigate marine casualties, 46 U.S.C. (Supp. II) 6301, the Coast Guard initiated an investigation of the death (Pet. App. 2a). Such an investigation is limited to determining such things as the cause of the fatality and whether any applicable laws were violated; unless a Coast Guard regulation has been violated, the investigating officer will make only nonbinding "recommendations" for the prevention of future accidents. 46 U.S.C. (Supp. II) 6301; 46 C.F.R. 4.01-01 to 4.40-35. See note 8, *infra*.

In the district court's view, "the Coast Guard's 'comprehensive regulation and supervision of seamen's conditions' aboard vessels operating in navigable waters [are] sufficiently 'general and pervasive as to displace OSHA coverage of it entirely' " (Pet. App. 15a-16a (quoting *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 826 & n.1 (5th Cir. 1983)).[3] In support of this conclusion, the court cited (Pet. App. 17a-18a), among other things, Coast Guard provisions ensuring the seaworthiness of a vessel (46 U.S.C. 653, 658 (now codified at 46 U.S.C. (Supp. II) 10901, 10902(a), 10906-10908)), requiring an investigation of accidents aboard ship (46 C.F.R. 4.01-4.40), and regulating certain safety equipment, such as lifesaving and firefighting equipment, aboard uninspected vessels (46 C.F.R. Pts. 24, 25, 26).

The district court specifically rejected the Second Circuit's conclusion in *Donovan* v. *Red Star Marine Services, Inc.*, 739 F.2d 774 (1984), cert. denied, No. 84-590 (Feb. 25, 1985), that the Coast Guard's minimal regulation of safety and health aboard the uninspected-vessel fleet displaces OSHA's authority only over particular working conditions actually addressed by the Coast Guard (Pet. App. 13a-15a). The district court relied on its perception that the *Texaco* court had recognized a "general industry-wide exemption for seamen" (Pet. App. 15a), and held that *Red Star's* distinction between inspected and uninspected vessels lacked "legal significance" (*ibid.*).

3. The court of appeals reversed. The court agreed with the Second Circuit that the Coast Guard's "circumscribed" authority to regulate employee health and safety aboard uninspected vessels does not divest OSHA of authority over

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[3]The district court mistakenly cited *Texaco* as a decision of the Eleventh Circuit. In fact, *Texaco* was decided by the Fifth Circuit after the Eleventh Circuit was created.

the uninspected-vessel fleet (Pet. App. 9a, 11a).[4] The court quoted the observation of that court in *Red Star* (739 F.2d at 777) that "the Coast Guard has historically viewed its authority to regulate uninspected vessels as limited to the regulation of life-saving and fire fighting equipment, backfire flame control, ventilation, the reporting of casualties and the licensing of operators" (Pet. App. 9a), and noted that the Coast Guard has unsuccessfully sought congressional expansion of its authority to regulate uninspected vessels (*id.* at 9a n.4).

Because the Coast Guard thus had not exercised any authority to regulate the working condition at issue in this case—crane safety—the court found that OSHA retained authority (Pet. App. 8a-9a). The court also observed that, under petitioner's analysis, "no federal agency would have the authority to regulate the safety of crane equipment aboard uninspected vessels" and found such a result "clearly contrary to the legislative intent of section 4(b)(1)" (*id.* at 9a): " 'Congress obviously wanted . . . health and safety conditions [aboard uninspected vessels] to be regulated . . . by *some* agency since it took the unusual step of requiring an actual exercise of authority to forestall OSHA coverage.' " *Ibid.* (bracketed phrase and omissions inserted by court of appeals) (quoting *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386, 389 (5th Cir. 1976) (emphasis in original), cert. denied, 434 U.S. 874 (1977)).

The court found the Fifth Circuit's decision in *Texaco* distinguishable (Pet. App. 10a). It noted that the issue in *Texaco* was whether the Coast Guard had in fact exercised authority over a particular working condition aboard an

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[4]Indeed, the court suggested that, even if the Coast Guard had more pervasively regulated the uninspected-vessel fleet, OSHA would retain authority over "precise working condition[s]" left unregulated (Pet. App. 10a-11a).

*inspected* vessel. The Fifth Circuit in *Texaco* concluded that the Coast Guard had "provided protection parallel to that which the OSHA regulatory scheme provided" and, accordingly, found OSHA divested of authority (Pet. App. 10a). "Thus, the [Fifth Circuit] had no occasion to recognize that the Coast Guard's comprehensive regulatory scheme relates primarily to seamen aboard inspected vessels" (*ibid.*). Likewise, the court found the Fifth Circuit's earlier decision in *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (1980), distinguishable because the court had found that OSHA had no regulations applicable to the working condition at issue in that case and thus had "exercised no jurisdiction which could be preempted" (Pet. App. 10a n.5).[5]

## ARGUMENT

The court of appeals correctly concluded that the Coast Guard's minimal regulation of working conditions on uninspected vessels affecting employee health and safety—which does not include regulation of the working condition of crane safety—does not, under 29 U.S.C. 653(b)(1), displace OSHA's regulation of crane safety aboard uninspected vessels. The decision below is in accord with the only other court of appeals decision dealing with OSHA's authority over the uninspected—vessel fleet. *Donovan* v. *Red Star Marine Services, Inc., supra.* This Court denied certiorari in *Red Star,* in which the petitioner made precisely the same arguments and cited precisely the same authorities as petitioner does here.

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[5]The Secretary also maintained in the court of appeals that petitioner could not raise its preemption argument in warrant enforcement proceedings, but must first exhaust administrative remedies by submitting to the inspection and contesting any citations issued as a result in proceedings before the Occupational Safety and Health Review Commission. See 29 U.S.C. 659. The court of appeals rejected this argument (Pet. App. 4a-8a).

Moreover, petitioner does not challenge the conclusion of the court of appeals that the Coast Guard lacks statutory authority to regulate generally the working conditions on uninspected vessels (Pet. App. 9a & n.4). See also *Red Star*, 739 F.2d at 777. The result of petitioner's position would therefore be to exclude the employees on petitioner's uninspected vessels from any general safety protection. There is no reason to believe that Congress intended to leave such a gap in coverage when it enacted the OSH Act. Review by this Court is therefore unwarranted.

1. As this Court has recognized, the OSH Act is to be "liberally construed to effectuate [its] congressional purpose" "to prevent occupational deaths and serious injuries." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13, 11 (1980) (footnote omitted). Other courts have accordingly interpreted OSHA's jurisdictional reach expansively, concluding that "[e]mployees should not lightly be denied the protection of OSHA" (*Marshall* v. *Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2d Cir. 1978)), and that 29 U.S.C. 653(b)(1) must "be construed to achieve the maximum protection for the industrial workers of the Nation." *Southern Railway* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.), cert. denied, 429 U.S. 999 (1976); accord, *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386, 392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); *Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d 913, 918 (3d Cir. 1980).

Courts interpreting the statutory exemption have found, on the basis of the legislative history and other factors, that OSHA loses authority only if the sister agency both possesses statutory power to regulate working conditions of employees and actually exercises that power. The "mere existence" of statutory authority is insufficient. *Southern Pacific*, 539 F.2d at 389-391; accord, *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Southern*

*Railway*, 539 F.2d at 336-337. The sister agency must actually take some steps toward exerting its statutory authority to regulate working conditions. See, *e.g.*, *Ensign-Bickford Co.* v. *OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983), cert. denied, 466 U.S. 937 (1984); *Columbia Gas*, 636 F.2d at 918; *Baltimore & Ohio Railroad* v. *OSHRC*, 548 F.2d 1052, 1055 (D.C. Cir. 1976).

Moreover, the sister agency's exercise of authority must be designed to protect a class of workers, not merely to effectuate an unrelated goal. See *Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1169 (D.C. Cir. 1975). And the courts have rejected the notion that an entire industry is exempt from the OSH Act simply because a sister agency has issued regulations affecting an employee class within the industry. *Southern Railway*, 539 F.2d at 338 (railroad employees in offices, shops, and repair facilities, whose working conditions are unregulated by the Department of Transportation, are not exempt from OSH Act coverage, even though employees in over-the-road operations are more extensively regulated by the Department of Transportation). As one court of appeals has put it, "the phrase 'working conditions' [does not have] a meaning which never appears elsewhere in OSHA—that of 'industries.' " *Southern Pacific*, 539 F.2d at 390; accord, *Southern Railway*, 539 F.2d at 339; *Baltimore & Ohio Railroad*, 548 F.2d at 1054.[6]

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[6]OSHA's authority is displaced if the sister agency has addressed the precise hazard at issue, even though it has not done so in the same manner as OSHA. See, *e.g.*, *PBR, Inc.*, 643 F.2d at 896; *Southern Pacific*, 539 F.2d at 391. Several courts have further refined the definition of "working conditions." Compare *Southern Railway*, 539 F.2d at 339 (working conditions include the "environmental area in which an employee customarily goes about his daily tasks"), and *U.S. Air, Inc.* v. *OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982) (same), with *Southern Pacific*, 539 F.2d at 391 (working conditions embrace both "surroundings," expressed as a general problem, and "hazards," expressed as a location, category, or specific item).

2. Against this background, the court of appeals correctly concluded that OSHA was not divested of authority in this case. As an initial matter, petitioner's assertion that "the Coast Guard has exercised statutory authority to regulate and supervise the working conditions of seamen serving on navigable waters" (Pet. 3-4) sweeps far too broadly. The Coast Guard has indeed extensively regulated working conditions aboard inspected vessels,[7] but it has issued only a few regulations that even affect the working conditions of employees aboard uninspected vessels, and most of those regulations are addressed to water and navigational safety generally or to nonsafety objectives rather than to the working conditions of a class of employees as such (see *Red Star*, 739 F.2d at 779-780). Uninspected vessels are subject only to regulations governing lifesaving equipment (46 C.F.R. Subpt. 25.25), firefighting equipment (46 C.F.R. Subpt. 25.30), backfire flame control (46 C.F.R. Subpt. 25.35), ventilation (46 C.F.R. Subpt. 25.40), liquefied petroleum gas (46 C.F.R. Subpt. 25.45), navigational warning devices (46 C.F.R. Subpt. 25.05 (1982)), marine casualty reporting (46 C.F.R. Subpt. 26.08), personnel licensing (46 C.F.R. 26.25-1), load lines (46 C.F.R. 42.01-1), nautical "rules of the road" (46 C.F.R. Subpts. 4.01-4.40), pollution control (33 C.F.R. Pts. 151-159), and navigational aids (33 C.F.R. Pts. 60-76). Moreover, not all of these regulations apply to all uninspected vessels. Plainly these few regulations affecting uninspected vessels do not, as petitioner suggests, comprehensively cover working conditions on uninspected vessels.

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[7]Compare 46 C.F.R. Pts. 24, 25, and 26 (uninspected vessels), with 46 C.F.R. Pt. 31 (inspection and certification requirements for tank vessels); 46 C.F.R. Pt. 71 (inspection and certification requirements for passenger vessels); and 46 C.F.R. Pt. 91 (inspection and certification requirements for cargo and miscellaneous vessels). Indeed, the Secretary and the Coast Guard have executed memoranda of understanding that recognize the pervasive Coast Guard regulation of inspected vessels. See 45 Fed. Reg. 14987 (1980); 48 Fed. Reg. 11365 (1983).

Petitioner does not in fact seriously maintain that the Coast Guard's limited regulation of the uninspected-vessel fleet suffices to displace OSHA's authority. Rather, petitioner seeks to merge two discrete classes of employees—those aboard inspected vessels and those aboard uninspected vessels—so as to conclude that the Coast Guard has regulated the entire industry. This broad conclusion is simply a variation of the notion, consistently rejected by the courts of appeals, that any exercise of regulatory authority by a sister agency that reaches any aspect of working conditions exempts every aspect of the affected industry from OSHA's authority. See *Southern Pacific*, 539 F.2d at 390; *Southern Railway*, 539 F.2d at 338-339; *Baltimore & Ohio Railroad*, 548 F.2d at 1054.

It is also significant that, as the court of appeals noted (Pet. App. 9a), the Coast Guard has not regulated crane safety on uninspected vessels because it does not believe it has statutory authority to do so. Thus, the Coast Guard has not simply failed to exercise recognized statutory authority; it maintains that it lacks authority to regulate further.[8]

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[8]Although petitioner asserts that the *Jekyll Island* is now subject to duplicative regulation by OSHA and the Coast Guard (Pet. 7), it nowhere identifies any applicable Coast Guard regulation addressing in any manner the working condition of crane safety or maintenance. As shown above, the Coast Guard's limited regulation of the uninspected-vessel fleet simply does not cover this working condition. Petitioner notes (Pet. 2) that the Coast Guard conducted a fatality investigation in this case but properly does not assert that its authority to do so (see 46 U.S.C. (Supp. II) 6301; 46 C.F.R. Pt. 4) expands the scope of its enforcement authority. Unless a Coast Guard regulation has been violated, the investigating officer will make only nonbinding "recommendations" for the prevention of future accidents. See 46 C.F.R. 4.07-1, 4.07-10. Such recommendations do not constitute standards or regulations affecting occupational safety or health capable of triggering Section 4(b)(1), since "[t]he goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." *Mineral Industries & Heavy Construction Group* v. *OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981); see also *Southern Pacific*, 539 F.2d at 391; *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859, 1866 (1982) (Cottine, Comm'r, dissenting).

3. Notwithstanding occasional broad statements quoted by petitioner (Pet. 4-6), the question presented is not the subject of any square conflict among the courts of appeals. The only two courts of appeals that have directly confronted the extent of Coast Guard regulation of the uninspected-vessel fleet (the court below and the Second Circuit in *Red Star*) are in agreement that the Coast Guard has not displaced OSHA regulation of uninspected vessels. The decisions of other courts of appeals, on which petitioner relies, do not address the significance of the fact that the uninspected-vessel fleet is virtually unregulated. Moreover, in each of the cases cited by petitioner, the holding did not have to rest on a finding of a statutory, industrywide exemption. The quoted statements by other courts of appeals, to the effect that all seamen are exempt from OSH Act coverage, are merely dicta that those courts would not necessarily follow in an uninspected-vessel case arising today. In the absence of an actual conflict on the issue that is presented in this case, certiorari should be denied. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

In *Donovan* v. *Texaco, Inc.*, 720 F.2d 825 (1983), the Fifth Circuit found that an OSHA employee protection provision could not be enforced aboard an *inspected* vessel that was, as the Secretary acknowledged (720 F.2d at 826, 827 n.3), subject to pervasive regulation by the Coast Guard. Because the vessel was inspected and thus subject to pervasive regulation, the Secretary conceded that the exemption provided by 29 U.S.C. 653(b)(1) was generally applicable. The question in *Texaco* was whether the OSHA provision was applicable notwithstanding the exemption, and the court held that it was not, in light of a Coast Guard regulation providing parallel protection. The court did say broadly that all seamen are exempt from OSH Act coverage, but this statement was unnecessary to its decision, and

the facts of *Texaco* did not require the court to consider the distinction between inspected and uninspected vessels recognized in *Red Star* and in this case. Indeed, at one point the court explicitly criticized the "invariable industry-wide exemption construction" urged by petitioner here, rejecting the notion "that at the moment a dominant agency exercises its regulatory authority on any aspect of an industry, OSHA's regulatory scheme is thereby completely abrogated as to that industry" (720 F.2d at 826 n.1).

In the Fifth Circuit's prior decision in *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (1980), the court did not consider the distinction between inspected and uninspected vessels or even mention whether the vessel at issue was inspected. The court based its decision in part on a finding that the proffered OSHA regulations did not appear relevant to any working conditions on the vessel involved. *Id.* at 1122. The decision, reached in a Jones Act case in which the government did not participate, was also based on an erroneous finding that the Occupational Safety and Health Review Commission "has disclaimed an intention to promulgate standards applicable to seamen." *Ibid.* It is the Secretary, not the Commission, that has authority to promulgate regulations (see note 10, *infra*), and the Secretary has determined that he does have authority over working conditions of employees aboard uninspected vessels; accordingly, *Clary's* broad language rests on an erroneous premise.

The Fourth Circuit decisions cited by petitioner also do not squarely address the exemption issue with respect to uninspected vessels. In *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980), the question was whether Coast Guard regulations applied to longshoremen, not whether Coast Guard regulations applied to seamen. The court held that longshoremen are under the authority of OSHA, not the Coast Guard. Accordingly, it never

considered the distinction between inspected and uninspected vessels and the impact of that distinction on whether, under 29 U.S.C. 653(b)(1), Coast Guard regulations displace OSHA's authority with respect to uninspected vessels. The other Fourth Circuit decision, *Barger* v. *Mayor of Baltimore*, 616 F.2d 730, cert. denied, 449 U.S. 834 (1980), likewise did not address the statutory exemption. *Barger* was a Jones Act tort suit, and the government was not a participant. The court was called on to decide whether a violation of OSHA standards, constituting negligence per se, had occurred. The court held that the employer had not preserved in the trial court its claim that OSHA's regulation was inapplicable (616 F.2d at 733), but it stated in dictum that the Coast Guard, not OSHA, had authority over the working condition at issue. That dictum, however, was based on a construction of the Secretary's regulations themselves, not the statute, as excluding seamen from coverage (616 F.2d at 732). When the question has been squarely presented, the Fourth Circuit has held that the statutory exemption is activated only by the actual exercise of authority by a sister agency. See, *e.g.*, *Southern Railway*, 539 F.2d at 336-337.

Finally, in *Kopczynski* v. *The Jacqueline*, 742 F.2d 555 (1984), cert. denied, No. 84-1618 (June 3, 1985), the Ninth Circuit held that the Coast Guard, not OSHA, had authority to regulate the particular working condition at issue. However, the OSHA regulation that the Jones Act plaintiff sought to invoke (see 742 F.2d at 558) was adopted from regulations issued under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. II) 901 *et seq.*, which, the court found, expressly excluded seamen from coverage. See 29 C.F.R. 1918.1; see

also 742 F.2d at 559 (quoting 29 C.F.R. 1915.2(b)).[9] The court's holding does not conflict with the decision below, because in *Kopczynski* the court did not consider whether the vessel in question was inspected or uninspected and did not consider the impact of that classification on the Coast Guard's preemption of OSHA's standards.

Because the decision below is compatible with these holdings of other courts of appeals, petitioner's argument (Pet. 7-8) that an uninspected vessel will or will not be subject to the OSH Act depending on the proximity of that vessel to a particular court of appeals is incorrect. Uninspected vessels have not been excluded from the Act's coverage in any jurisdiction.[10]

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[9]Pursuant to statutory authority (Section 6(a), 29 U.S.C. 655(a)), the Secretary adopted certain longshoring safety and health regulations as OSHA standards. See 29 C.F.R. Pt. 1918.

[10]Moreover, the contrary decision of the Occupational Safety and Health Review Commission in *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982), is not entitled to deference. It is the Secretary of Labor, not the Commission, that is charged with "sole responsibility" for the administration of the Act. *Cuyahoga Valley Railway* v. *United Transportation Union*, No. 84-1634 (Nov. 4, 1985), slip op. 4 (per curiam). For this reason, it is the Secretary's interpretation of the exemption provision, rather than the interpretation by the Commission, that is entitled to judicial deference. Cf. *Whirlpool Corp.*, 445 U.S. at 11 (Secretary's interpretive OSHA regulation deserves deference). In any event, the Commission's decision in *Dillingham Tug & Barge Corp.*, is erroneous. The Commission based its decision, in part, on the incorrect assumption that the Coast Guard believes that it has authority to regulate all working conditions aboard uninspected vessels. 10 O.S.H. Cas. (BNA) at 1861 n.8. As we show in note 8, *supra*, the Coast Guard's authority to investigate maritime accidents when a fatality has occurred does not provide it with authority to regulate working conditions of seamen aboard uninspected vessels.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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